

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AVERELL LAVAR WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

October 11, 2002

No. 230883

Ingham Circuit Court

LC No. 00-075787-FC

Before: Markey, P.J., and Cavanagh and R.P. Griffin*, JJ.

PER CURIAM.

Defendant appeals by right his convictions following a jury trial of one count of first-degree felony murder, MCL 750.316, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life without parole for first-degree felony murder and two years' imprisonment for felony-firearm. We affirm.

Defendant first argues the trial court committed error requiring reversal when it overruled defense objections to the admission of prior consistent statements of a testifying witness. The decision to admit evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists when an unprejudiced person, considering all the facts, would say there was no justification or excuse for the ruling. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). Preliminary issues of law regarding the admissibility of evidence based on the construction of a statute or court rule are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The prosecution acknowledges that the court improperly admitted the statements because the witness's statements to the police were made after the witness's motive to lie arose. Therefore, the only issue in need of resolution is whether the error was harmless. The standard for reviewing preserved nonconstitutional errors was most recently address by the Supreme Court in *People v Whittaker*, 465 Mich 422; 635 NW2d 687 (2001), where the Court provided:

“In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

probable than not that the error in question was outcome determinative. *People v Lukity*, 460 Mich 484, 485-496; 596 NW2d 607 (1999). An error is deemed to have been ‘outcome determinative’ if it undermined the reliability of the verdict. See *People v Snyder*, 462 Mich 38, 45; 605 NW2d 831 (2000), citing *Lukity*, *supra* at 495-496. In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence. See *Lukity*, *supra* at 495; *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).” [*Whittaker*, *supra* at 427, quoting *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).]

Assuming the trial court abused its discretion in admitting evidence of the witness’s prior consistent statements to the police, we find the error harmless. Although the witness was one of the prosecution’s main witnesses and his credibility was at issue, there was sufficient evidence to corroborate the witness’s trial testimony and to substantiate defendant’s role. The witness’s testimony put defendant at the scene of the crime, with a weapon, and established defendant’s intent to commit a robbery. Eyewitness testimony corroborated much of the witness’s testimony, including the victim’s fiancée’s testimony. Further, from defendant’s taped conversation with a fellow inmate, the jury could surmise defendant’s involvement. Thus, in light of the strength and weight of the untainted evidence in this case, the error was harmless.

Defendant next argues the trial court erred in admitting the tape and transcript of a conversation between defendant and a fellow inmate. Defendant argues his constitutional rights were violated because he was not given his *Miranda*¹ warnings before the questioning, his statements were involuntary, and the questioning violated his expectation of privacy and his rights to remain silent, to counsel, and to due process. Constitutional issues are reviewed de novo. *McDougall v Schanz*, 461 Mich 15, 23; 597 NW2d 148 (1999).

This issue involves a taped conversation the police made through an informant while defendant was in prison on an unrelated crime. This Court recently addressed this issue in the context of a Fifth Amendment violation in *People v Fox (After Remand)*, 232 Mich App 541; 591 NW2d 384 (1998). In *Fox*, the defendant argued that the prosecution violated his Fifth Amendment right against self-incrimination by outfitting another prisoner with a concealed radio transmitter used while having a conversation with the defendant while he was in custody. Relying on *Illinois v Perkins*, 496 US 292; 110 S Ct 2394; 110 L Ed 2d 243 (1990), this Court found no violation of the right against self-incrimination based on another prisoner’s surreptitiously acting as a police agent while conversing with the defendant. *Id.* at 552-553. Therefore, under *Fox*, defendant’s claim fails.

To the extent defendant raises the issue of a violation of his Sixth Amendment right to counsel, this argument must also fail. The Sixth Amendment right to counsel attaches only at or after the initiation of adversarial proceedings. See *People v Winters*, 225 Mich App 718, 723; 571 NW2d 764 (1997). Defendant acknowledges that the conversation took place in December 1998. A warrant was not issued and charges were not filed for the instant case until February 2000. Defendant’s right to counsel had not yet attached; therefore, his claim fails.

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant also argues that the Michigan Constitution is more protective of his rights than the federal Constitution. We find this argument without merit. The right to counsel guaranteed by the Michigan Constitution is generally the same as that guaranteed by the Sixth Amendment, and absent a compelling reason to afford greater protection under the Michigan Constitution, the right to counsel provisions are construed to afford the same protections. *People v Marsack*, 231 Mich App 364, 373; 586 NW2d 234 (1998); see also, *Phillips v Deihm*, 213 Mich App 389, 400; 541 NW2d 566 (1995); *People v Mayes (After Remand)*, 202 Mich App 181, 189-190; 508 NW2d 161 (1993). Defendant has offered no compelling reason to afford him greater protection under the Michigan's Constitution's right to counsel provisions; thus, his claim fails.

We affirm.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Robert P. Griffin